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No. 96-63

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICKI HANSBERGER, DOROTHY FELTON AND TERESA PROCTOR, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
STEVEN H. ROSENBAUM
MICHELLE ARONOWITZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the appeal of the district court's denial of appellants' motion to intervene in this Section 5 enforcement action is moot.

2. Whether the district court properly denied appeallants' motion to intervene.

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Pursuant to 28 U.S.C. 2106 and Rule 18.6 of the Supreme Court Rules, the Solicitor General, on behalf of the United States, moves that this appeal be dismissed as moot or that, in the alternative, the ruling of the district court denying intervention to appellants be affirmed.

OPINIONS BELOW

The orders of the three-judge district court granting in part and denying in part a permanent injunction for the United States (J.S. App. 1-8) and denying appellants' motion to intervene (J.S. App. 9-23) are unreported.

JURISDICTION

The judgment of the district court denying appellants' motion to intervene was entered on April 9, 1996. Appellants' notice of appeal (J.S. App. 24-27) was filed on June 4, 1996, the jurisdictional statement was filed on July 11, 1996, and the appeal was docketed on July 12, 1996. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c and 28 U.S.C. 2101(b).

STATEMENT

1. Under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, Georgia may not implement a change in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless (1) it has obtained a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) it has submitted the proposed change to the Department of Justice for administrative preclearance and the Department has interposed no objection.

This case concerns redistricting plans for Georgia's state legislature. In April 1992, the State of Georgia enacted redistricting plans for the Georgia House of Representatives and the Georgia Senate, Ga. Code Ann. §§ 28-2-1 and 28-2-2 (Michie 1993), which were precleared by the Attorney General pursuant to Section 5 of the Voting Rights Act. With only limited and precleared changes, the State used these 1992 redistricting plans for elections in 1992 and 1994. J.S. App. 2.

2. In September 1995, the State of Georgia enacted new redistricting plans for the State House of Repre-

sentatives and the State Senate. The State submitted these 1995 plans to the Attorney General for review, and, on March 15, 1996, the Attorney General interposed timely objections to the plans. J.S. App. 2-4.

3. On March 5, 1996, several residents of the State of Georgia filed an action in the Southern District of Georgia challenging the 1992 Georgia House and Senate redistricting plans as unconstitutional racial gerrymanders, *Johnson* v. *Miller*, No. CV196-040 (*Johnson III*).[1] On March 18, 1996, conceding that the 1992 state legislative redistricting plans were in its view unconstitutional, the State of Georgia sought imposition of the unprecleared 1995 redistricting plans as a remedy for alleged constitutional violations in the 1992 plans. J.S. App. 3; Compl. Exh. C.

4. On March 21, 1996, the United States filed the present action in the Northern District of Georgia to enjoin the State of Georgia from violating Section 5 of the Voting Rights Act by seeking to implement the unprecleared 1995 redistricting plans. J.S. App. 4.

5. Appellants moved to intervene in the present action on March 25, 1996. Their motion to intervene (J.S. App. 28-32) stated that one appellant is a candidate for Georgia Senate District 56, one is a candidate for reelection for Georgia House District 43, and the

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[1] For a history of the *Johnson* litigation, see *Johnson* v. *Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) (*Johnson I*) (finding equal protection violation in Georgia's 11th congressional district), aff'd, 115 S. Ct. 2475 (1995), on remand, 922 F. Supp. 1552 (S.D. Ga. 1995) (*Johnson II*) (finding equal protection violation in Georgia's 2d congressional district), and on remand, 922 F. Supp. 1556 (S.D. Ga. 1995) (*Johnson II*) (redrawing Georgia's congressional districts to remedy equal protection violations), prob. juris. noted, *Abrams* v. *Johnson*, 116 S. Ct. 1823 (1996) (Nos. 95-1425 & 95-1460).

third is a registered voter in both Senate District 56 and House District 43. J.S. App. 28-29, 39-40.

Appellants did not file a pleading setting forth the claim or defense for which intervention was sought, as required by Federal Rule of Civil Procedure 24(c). Their motion to intervene, however, seems to assert that, if allowed to intervene, appellants would raise both as-applied and facial constitutional challenges to Section 5 of the Voting Rights Act. Appellants' motion stated that they should be granted intervention because the United States' requested relief would "directly affect the conduct of the election[s]" (J.S. App. 28, 29), and because the state defendants would not adequately represent their interests by asserting a counterclaim for a declaratory judgment that Section 5 is unconstitutional (*id.* at 30). They stated that the United States' requested relief, if granted, would likely result in no elections being held in 1996, and because there is no hold-over provision in Georgia law, "the governance of [Georgia] will be placed in the hands of its executive branch of government in a quasi-martial emergency or in the hands of the federal courts." *Id.* at 29-30. Appellants asserted that this outcome would violate their rights under the Georgia Constitution, as well as their rights under the Guarantee Clause, the Privileges and Immunities Clause, and the Fifth, Ninth, Fourteenth, and Fifteenth Amendments of the United States Constitution. *Id.* at 30.

6. The United States opposed the intervention, as did the state defendants. The three-judge district court heard argument on the United States' motion for preliminary and permanent injunction on April 4, 1996. Appellants argued their intervention motion (Tr. 5-13), were granted provisional intervenor status

for purposes of the hearing only (Tr. 26), and argued the merits of their facial challenge (Tr. 55-58).

7. On April 9, the district court enjoined the state defendants from implementing the 1995 redistricting plans unless and until precleared, or unless and until adopted as an interim remedy by the *Johnson III* court. J.S. App. 8. That order left the precleared 1992 state legislative plans in place for the 1996 elections.

8. On the same day, April 9, the district court denied appellants' motion for intervention. J.S. App. 9-23. The court denied intervention as of right for the as-applied challenge because it found that appellants' asserted interest was too remote: "First, it is not at all clear that the 'likely result' of this action will be that no elections will take place in 1996. Second, it is not at all clear that the absence of timely elections would deny the Applicants their right to a republican form of government by placing Georgia under martial law or under rule of the courts." *Id.* at 19. It denied intervention as of right for the facial challenge because it found that, to the extent that appellants even had a distinct interest in a declaratory judgment that Section 5 is unconstitutional, such interest would not be impaired by a judgment in this action and could be vindicated in a separate lawsuit. *Id.* at 20.

The district court denied permissive intervention because appellants' putative counterclaim did not have a question of law or fact in common with the United States' claim and the delay caused by appellants' intervention would unduly prejudice both the original parties and the public interest. J.S. App. 20-22.

9. On April 30, 1996, the three-judge court in *Johnson III* ruled on plaintiffs' motion for prelimi-

nary relief.[2] It issued its memorandum opinion on May 24, 1996. *Johnson III*, 929 F. Supp. 1529 (S.D. Ga. 1996). The court found a likelihood that some of the districts in the 1992 plans would be found unconstitutional and ordered in place for the 1996 elections a large part of the unprecleared 1995 plans as an interim remedy.[3]

Appellants did not seek to intervene in *Johnson III*. The interim remedy was not appealed, the constitutional challenge to the state legislative districts in the 1992 plan is now being litigated on its merits, and the 1996 elections are proceeding under the court-ordered plan. The primary was held on July 9, the runoff was held on August 6, and the general election will be held on November 5.

ARGUMENT

This appeal from the denial of appellants' motion to intervene should be dismissed as moot. Appellants sought intervention to oppose an injunction against implementation of the unprecleared 1995 plans and to vindicate their asserted interest in seeing to it that state legislative elections be held in 1996. Another three-judge court, however, has since ordered the 1996 elections to proceed under its own remedial redistricting plans which, as they affect appellants' districts, are identical to the unprecleared 1995 plans that appellants seek to implement. Thus, there is no longer a live controversy in which appellants can

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[2] The *Johnson III* court had granted the United States' motion to intervene on April 9, 1996.

[3] In particular, the court adopted the unprecleared 1995 plan for House District 43 and Senate District 56, the two districts in which the three appellants reside. *Johnson III*, 929 F. Supp. at 1561.

intervene to challenge the constitutionality of Section 5.[4]

1. Appellants' as-applied challenge is moot. Appellants claimed that if the unprecleared 1995 plans were enjoined, as requested by the United States, the 1996 elections would be cancelled, Georgia would revert to quasi-martial or judicial rule, and their state and federal constitutional rights would thereby be violated. The 1996 elections, however, have been ordered to proceed by the district court in *Johnson III*. The primary and runoff elections have been held, and the general elections will be held November 5. There is thus no live controversy as to whether the United States' Section 5 enforcement action will violate appellants' constitutional rights by causing the 1996 elections to be cancelled. See *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam) (constitutional challenge to residency requirement for presidential election mooted when State lowered requirement from six to two months, and plaintiffs would have met the two-month requirement); *Gray* v. *Board of Trustees*, 342 U.S. 517 (1952) (per curiam) (constitutional challenge to university's refusal to admit African Americans mooted when plaintiffs were admitted).

2. Appellants' facial challenge is moot. Appellants seek to intervene to counterclaim for a declaratory judgment that Section 5 is unconstitutional on its face. Declaratory judgment jurisdiction, however, requires "concrete legal issues, presented in actual cases, not abstractions." *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969). Appellants' counterclaim no

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[4] To avoid mootness, the actual controversy must exist at all stages of review, including appeal. *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974).

longer presents a live controversy because the underlying action between the United States and Georgia has been superseded by the preliminary injunction granted in *Johnson III*. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (holding that request for declaration that Florida state statutes violate Commerce Clause is moot because, due to superseding federal law, "no matter how the Commerce Clause issues in this suit are resolved the [particular] application [in this case] can constitutionally be denied").

Pursuant to Section 5, the United States sought an injunction in this case to prevent the State of Georgia from implementing the unprecleared 1995 redistricting plans. Appellants sought intervention to oppose the United States' request for an injunction against the 1995 plans. On April 9, the district court enjoined the State from implementing the unprecleared 1995 plans, but the injunction was contingent on the 1995 plans not being adopted, in whole or in part, by the *Johnson III* court as an interim remedy for a finding that the 1992 plans are unconstitutional.

Appellants' facial challenge became moot on April 30 when the *Johnson III* court superseded the injunction issued in this case by imposing its own redistricting plans for the 1996 elections as an interim remedy for the likely unconstitutionality of parts of the 1992 plans. The *Johnson III* court adopted the 1995 redistricting plans for all but two of the 56 Senate districts, and all but six of the 180 House districts.[5] In particular, the *Johnson III* court

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[5] In keeping with the remedial principle of deference to legislative reapportionment decisions, see *Upham* v. *Seamon*, 456 U.S. 37 (1982) (per curiam), the *Johnson III* court used the

adopted the 1995 redistricting plans for both House District 43 and Senate District 56, in which appellants reside. The *Johnson III* court has thus resolved the underlying dispute in which appellants seek to intervene. Redistricting for the 1996 elections is now under the control of the *Johnson III* court, not the district court in this case. See *Public Serv. Co.* v. *Consolidated Utils. & Communications, Inc.*, 846 F.2d 803, 808, 809 (1st Cir. 1988) (bankruptcy filing mooted Securities Exchange Act issues because, "[w]hile [plaintiff] is in bankruptcy, the bankruptcy rules—and not the proxy rules—govern the behavior of [the] parties" and, "regardless of the decision that this court might reach on the merits, the outcome of the bankruptcy proceeding would be the same"); *United States* v. *Wylie*, 730 F.2d 1401, 1402 (11th Cir. 1984) (appeal of order quashing summons to produce documents mooted where defendant no longer possessed documents); *National Bulk Carriers, Inc.* v. *Princess Management Co.*, 597 F.2d 819, 825 n.13 (2d Cir. 1979) (appeal of denial of intervention mooted by affirmance of main action on appeal where intervention could not have afforded prospective intervenor more than the relief already granted on appeal).

1995 plans for those districts to which the Attorney General had not interposed objections. *Johnson III*, 929 F. Supp. at 1561. The *Johnson III* court also used the 1995 plans for those districts in which it found a likely constitutional violation in the 1992 plans. *Id.* at 1562-1566. This left only eight districts for which 1995 plans were not used: Senate Districts 12 and 14 in Dougherty, Webster, and Stewart Counties, and House Districts 148, 149, 150, 151, 152, and 153 in Chatham County. *Id.* at 1566-1567. (The memorandum opinion states that there are five house districts in Chatham County, but in fact there are six.)

3. These mooted issues are not capable of repetition yet evading review. This Court has "permitted suits for prospective relief to go forward despite abatement of the underlying injury only in the 'exceptional situations' where the following two circumtances were simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 481 (1990) (internal quotation marks and citation omitted). The precipitating event for a Section 5 challenge is a change in an election practice or procedure. Unlike the election itself, the election practice or procedure will not necessarily expire before a claim can be fully litigated. In this case, it was the unusual and intervening event of the preliminary injunction in *Johnson III* ordering the 1996 elections to proceed under plans identical in their pertinent aspects to the unprecleared 1995 plans enjoined in this action that mooted appellants' claims. An intervening constitutional challenge to the existing state legislative redistricting plans of that sort is not likely to moot out every constitutional challenge to Section 5 of the Voting Rights Act. Cf. *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969) (exception to mootness doctrine applied to avoid mooting constitutional challenge to candidacy requirements after every election). Thus, appellants' claims are not capable of repetition yet evading review.

4. If this case is not moot, the district court's ruling denying intervention under Federal Rule of Civil Procedure 24 should be affirmed. The primary interest that appellants asserted to support their

right to intervene is their interest in avoiding a situation where no state legislative elections at all are held in Georgia this year. As the district court ruled, however, a threat to that interest was quite remote from any of the questions that were at issue in this case. See J.S. App. 19. First, an injunction against unprecleared voting changes under Section 5 does not ordinarily preclude the holding of an election, and it did not do so in this case. See *City of Rome* v. *United States*, 446 U.S. 156, 182-183 (1980) (rejecting constitutional challenge to the Voting Rights Act based on the fact that elections had not been held in Rome for six years because "[t]he Act does not * * * prevent a covered jurisdiction from holding elections; rather, it simply provides that elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared"). Moreover, as the district court also noted (J.S. App. 19), even the delay of elections in the State would not necessarily have injured their interests, since "Georgia's legislature is out of session for most of the calendar year anyway" and "the absence of ongoing legislative action does not deny Georgians the right to a republican form of government, place them under martial law, or place their governance 'in the hands of the federal courts.'"

Nor should appellants have been granted a right to intervene to bring a counterclaim for a declaratory judgment that Section 5 of the Voting Rights Act is unconstitutional. This Court has squarely held that Section 5 of the Voting Rights Act is constitutional. See, *e.g.*, *City of Rome* v. *United States*, *supra*; *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). A federal court has no obligation to permit individuals

to intervene in ongoing litigation merely in order to insert into the litigation constitutional challenges to a statute that have already been rejected by this Court. That is particularly true where, as here, circumstances require expedited litigation of the case in which intervention is sought. See J.S. App. 21.

Finally, the district court correctly denied permissive intervention in this case. As the court explained (J.S. App. 21), appellants' claims do not present "a question of law or fact in common" with the main action. In any event, Rule 24(b) provides that "[i]n exercising its discretion [regarding permissive intervention] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). The district court noted that appellants would have required months of discovery and considerable trial time to present their claims to the district court. J.S. App. 21. The resulting delay would have "unduly prejudice[d] both the original parties to this case and the public interest in promptly resolving this dispute." *Id.* at 22.

CONCLUSION

This appeal of the denial of appellants' motion for intervention should be dismissed as moot. In the alternative, the district court's order denying intervention should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
STEVEN H. ROSENBAUM
MICHELLE ARONOWITZ
Attorneys

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